the insured in taking out the policy and in designating an alternative beneficiary was to provide for his family, our courts have generally endeavored so to read the contract as to respect that intention.[10] The effect of this judicial construction is to convert what is in terms a condition subsequent to the right of the prior beneficiary, into a condition precedent,[11] and thus place the burden of proof upon his representative.

In determining where the burden of proof lies, much emphasis has been laid upon the question as to whether or not the beneficiary's right is vested.[12] That the right is vested, however, means nothing more than that it is beyond the power of the insured or the insurer to deprive the beneficiary of it, and does not mean that he can assert his claim otherwise than in accordance with the terms prescribed in the policy.[13] It is not therefore perceived how the vested character of the right can dispense with the necessity of proof on his part of any condition which the insured has stipulated shall have happened before the beneficiary can obtain the proceeds. The true basis, it is submitted, for the determination of the incidence of the burden of proof, is the character of the condition which the insured has annexed to the right of the beneficiary; a question of construction for the court.

THE RULE AGAINST PERPETUITIES AND THE SEVERABILITY OF LIMITATIONS.—Since the purpose of the common law rule against perpetuities is to prevent the postponement of vesting of future interests beyond the termination of a life or lives in being and twenty-one years, every future interest is required to be of such nature that it must vest if at all within the requisite period, and the mere possibility that it may vest beyond the limits set by the rule is sufficient to invalidate it.[1] Where, however, the disposition in effect consists of alternative independent gifts conditioned on the happening of either of two events, one of which may be too remote and the other is good, the law will disregard the former and give effect to the limitation upon the latter contingency.[2] On the other hand, where the gift is expressed as

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Y," it is equally obvious that the survival of the insured or the predecease of X is a condition precedent to Y's right to the money, and a condition subsequent to the claim of X, who, because of Y's inability to satisfy his burden of proof, will prevail. Cowman *v.* Rogers *supra;* but see Middeke *v.* Balder (1902) 198 Ill. 590; Males *v.* Woodmen of the World (1902) 30 Tex. Civ. App. 184.

[10]Paden *v.* Briscoe (1891) 81 Tex. 563; Supreme Council *v.* Kacer *supra;* Southwell *v.* Gray (N. Y. 1901) 35 Misc. 740; and see Fuller *v.* Linzee (1883) 135 Mass. 468.

[11]Thus the court interprets "to X, but if X predecease the insured, to Y" to mean "to X, but if X predecease or die simultaneously with the insured, to Y," which is evidently the same as "to X if surviving; if not, to Y."

[12]United States Casualty Co. *v.* Kacer *supra;* Males *v.* Woodmen of the World *supra;* Middeke *v.* Balder *supra.*

[13]Vance, Insurance 390, 391.

[1]Gray, Perpetuities (2nd ed.) §§ 201, 214; Dungannon *v.* Smith (1846) 12 Cl. & F. 546.

[2]Longhead *v.* Phelps (1770) 2 W. Bl. 704; Monypenny *v.* Dering (1852) 2 De G. M. & G. 145, 180; Miles *v.* Harford (1879) L. R. 12 Ch. Div. 691; Schettler *v.* Smith (1869) 41 N. Y. 328.

dependent on one event, the law will not divide it into two gifts, even if the contingency is compound and is capable of being severed.[3] The reason for this doctrine is apparent when it is considered that otherwise every limitation which may or may not vest within the required time could always be divided into two gifts, one necessarily to take effect, if at all, within the legal limits, and the other afterward, and the rule against perpetuities would be thus defeated in a large class of cases.[4]

The operation of these principles is illustrated in their application to gifts to classes. Where the limitation is to a class of persons fulfilling a given condition and the number of members constituting the group may possibly be unascertained until a time beyond the legal limits, the whole disposition is void for remoteness even if the class is in fact closed within the prescribed period.[5] The court will not divide such a limitation into two portions and permit those members who are capable of taking, to do so, since such a construction would alter the instrument and make a distinction not intended by the grantor or the testator.[6] Although it has been contended in a case in which the maximum number of persons who can possibly enter the class must be ascertained within the limits of the rule, and the minimum share of each member thereby calculated, that every person who fufills the condition within the period of perpetuities should be permitted to take such minimum share, this suggestion has not been accepted by the courts and the entire gift is regarded as invalid[7] unless the whole class must necessarily be ascertainable during the time set by the rule. Where, on the other hand, the disposition is in effect a series of independent gifts to distinct classes or individuals, so that the amount given to an individual or to members of a single class cannot be augmented or diminished whatever be the number of members of the whole group, then the limitation is enforced as to those who can take within the period allowed by law.[8]

The principle that the court will not split a gift expressed as dependent on a single event has, however, become subject to one exception. If the limitation is such that it may operate either as an executory devise or a contingent remainder, effect will be given to it if in fact it operates as a valid remainder, even though as an executory devise it would have been too remote.[9] This doctrine, formulated at a time when legal contingent remainders were not understood to be subject to the rule against perpetuities,[10] is probably due to the well-estab-

[3]Proctor *v.* Bishop of Bath & Wells (1794) 2 H. Bl. 358; Dungannon *v.* Smith *supra; In re* Harvey (1888) L. R. 39 Ch. Div. 289.

[4]Hancock *v.* Watson L. R. [1902] A. C. 14.

[5]Leake *v.* Robinson (1817) 2 Mer. 363; Jee *v.* Audley (1787) 1 Cox 324; Stuart *v.* Cockerell (1870) L. R. 5 Ch. 713; Coggins' Appeal (1889) 124 Pa. St. 10.

[6]Leake *v.* Robinson *supra.*

[7]Hale *v.* Hale (1876) L. R. 3 Ch. Div. 643; Pearks *v.* Moseley (1880) L. R. 5 App. Cas. 714.

[8]Cattlin *v.* Brown (1853) 11 Hare 372; Hills *v.* Simonds (1878) 125 Mass. 536; Dorr *v.* Lovering (1888) 147 Mass. 530.

[9]Evers *v.* Challis (1850) 18 Q. B. Rep. 224; (1859) 7 H. L. C. 531. See Halsey *v.* Goddard (1898) 86 Fed. 25.

[10]See Cole *v.* Sewell (1843) 4 Dr. & War. 128; Challis, Real Prop. 159; Fowler, N. Y. Real Prop. Law 46, 263-4. Since legal remainders are

lished principle of the common law that every limitation must, if possible, be construed as a remainder rather than an executory devise.[11] Although attempts have been made to apply this exception to other classes of gifts that can be analyzed into two or more contingencies,[12] the courts have refused to sanction the extension.[13]

Another exception to the principle of non-severability of limitations which are not expressly separated in the instrument creating them, has been developed by the English courts in recent years. Where a power is given whereby an intermediate estate may be created so as to render too remote the vesting of a gift over, it is held that the limitation over is good even though in terms dependent on a single contingency, if the power is in fact not exercised.[14] This result necessarily follows from the fact that a power is not in itself an estate, but is merely a method by which a vested estate may be later divested, or the vesting of a contingent interest postponed, by the act of a third party.[15] Consequently, while the disposition is expressed as one, it virtually consists of two distinct possibilities of an entirely different nature. Furthermore, this development presents a desirable modification of the law, since it tends to effectuate the intention of the testator.[16]

The English Court of Appeal applied this rule in *Re Davies' and Kent's Contract* (1910) 79 L. J. Ch. Div. 689, to a case where the power had been exercised but the appointment was such as not to invalidate the gift over. The testator left certain property to trustees in trust to pay a proportionate share of the income to each of his children, each of whom was given the power to appoint his or her wife or husband to receive such share during his or her widowerhood or widowhood. A gift over of each child's share on the termination of the prior estates was then made to grandchildren. Obviously, a child could appoint to a person not in *esse* at the time of the testator's death and thereby render the limitation over void. Inasmuch, however, as the power was not in fact so exercised, the trusts were declared valid. A power is not rendered bad by the fact that within its terms an appointment could be made which would be too remote,[17] but the validity of an estate actually created in pursuance thereof is determined as though it were created by the instrument giving rise to the power; and there seems to be no reason why the same principle should not be applied to a limitation over after such appointment. The court based its decision on the theory of alternative independent gifts, but it seems that since that doctrine is confined to cases in which the limitations are expressly

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now subject to both the double possibility rule and the rule against perpetuities; *In re* Ashforth L. R. [1905] 1 Ch. 535; 9 COLUMBIA LAW REVIEW 724; it would seem to follow that a remainder in order to take effect under Evers *v.* Challis *supra,* must not contravene either of these principles.

[11]*In re* Bence L. R. [1891] 3 Ch. 242.

[12]Watson *v.* Young (1885) L. R. 28 Ch. Div. 436; 1 Jarman, Wills (5th ed.) 257.

[13]*In re* Bence *supra;* Hancock *v.* Watson *supra;* Gray, Perpetuities (2nd ed.) §§ 338, 339; Marsden, Perpetuities 73.

[14]*In re* Bowles L. R. [1905] 1 Ch. 371; Theobald, Wills 605.

[15]Farwell, Powers 276.

[16]*In re* Abbott L. R. [1893] 1 Ch. 54.

[17]Stone *v.* Forbes (1905) 189 Mass. 163, 170.

severed in the instrument creating them,[18] the result reached in these cases should rather be recognized as a new exception to the general principle.

LIABILITY FOR INJURIES BY ANIMALS.—A man may be held responsible for the harm done by an animal because of actual fault on his part just as for a wrongful or negligent use of any other property.[1] Where the animal belongs to a harmless species and the owner has no reason to suppose that it is vicious, there is no liability without proof of such fault.[2] But if a man owns or harbors[3] an animal of a dangerous species,[4] or one that is vicious to his knowledge,[5] the probability of its causing injury creates a more comprehensive basis of responsibility independent of the ordinary rules of negligence.[6] In a few jurisdictions, nevertheless, the liability even in these cases rests on negligence, which is presumed, however, from proof of the injury, ownership or harboring, and, if the animal is harmless by nature, *scienter* of its viciousness.[7] The *prima facie* case thus established may be rebutted by showing that the owner has exercised a degree of care commensurate with the requirements of the situation.[8]

From the earliest period of the common law, however, it has been held that one who keeps a wild animal,[9] or a tame one with knowledge

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[18] *In re* Harvey *supra.*

[1] Dickinson *v.* McCoy (1868) 39 N. Y. 400; Clowdis *v.* Fresno Flume etc. Co. (1897) 118 Cal. 315.

[2] Haneman *v.* Western Meat Co. (Cal. 1908) 97 Pac. 695; Reed *v.* Southern Express Co. (1894) 95 Ga. 108; Oldham *v.* Hussey (1905) 27 R. I. 366.

[3] It is immaterial that the defendant did not own the animal if he harbored it. Quilty *v.* Battie (1892) 135 N. Y. 201; Plummer *v.* Ricker (1898) 71 Vt. 114; see Boylan *v.* Everett (1899) 172 Mass. 433.

[4] The classification of animals into animals *ferae naturae* and animals *mansuetae naturae* has been borrowed from the law of property, although it is not strictly applicable to this class of cases. Earl *v.* Van Alstyne (N. Y. 1850) 8 Barb. 630; Filburn *v.* People's Palace and Aquarium Co. (1890) L. R. 25 Q. B. Div. 258; Parsons *v.* Mauser (1903) 119 Ia. 88.

[5] Such an animal has been treated in the same way as an animal naturally dangerous. Laverone *v.* Mangianti (1871) 41 Cal. 138; Jackson *v.* Smithson (1846) 15 M. & W. 563; but see Holmes, Common Law 157, 158.

[6] Emmons *v.* Stevane (1908) 77 N. J. L. 570; Harris *v.* Carstens Packing Co. (Wash. 1906) 16 L. R. A. [N. S.] 1164 and note; Popplewell *v.* Pierce (Mass. 1852) 10 Cush. 509; May *v.* Burdett (1846) 9 Q. B. 101; Barnes *v.* Lucille Ltd. (1907) 96 L. T. 680. So contributory negligence in the ordinary sense is no defense. Mann *v.* Weiand (1875) 81* Pa. St. 243; Marble *v.* Ross (1878) 124 Mass. 44; and see Meibus *v.* Dodge (1875) 38 Wis. 300; Schilling *v.* Smith (N. Y. 1902) 76 App. Div. 464, for what is contributory negligence in children. Nor is it a defense that the plaintiff was a trespasser. Sherfey *v.* Bartley (Tenn. 1856) 4 Sneed 58; but see Lowery *v.* Walter L. R. [1910] 1 K. B. 173.

[7] Hayes *v.* Smith (1900) 62 Oh. St. 161, 182; Thomas *v.* Boyson (1901) 21 Oh. C. C. R. 302; see also Fake *v.* Addicks (1890) 45 Minn. 37; Bentz *v.* Page (1905) 115 La. 560.

[8] See cases in note 7.

[9] Hayes *v.* Miller (Ala. 1907) 11 L. R. A. [N. S.] 748 and note; Filburn *v.* People's Palace and Aquarium Co. *supra.*